85-766

No.

Supreme Court, U.S.
FILED
NOV 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States
October Term, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,
Appellant,

v.

REPUBLICAN PARTY of the STATE of CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. McKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Jurisdictional Statement

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QUESTIONS PRESENTED

Where the state creates, regulates, and with its towns finances state primaries, and also grants automatic and preferential access on the general election ballot to the primary winners,

1. Does a state statute which requires only that a person belong to a political party in order to vote in that primary violate the First Amendment of the U.S. Constitution solely because a party adopts a conflicting rule?

2. Does a party rule which provides, contrary to state law, that unaffiliated persons may vote in some, but not all, state primaries undermine the State's responsibility to set voter

qualifications and regulate elections under Art. I, §§ 2 and 4, and the Tenth and Seventeenth Amendments of the U.S. Constitution?

3. Does the party rule also violate Art. I, § 2, and the Seventeenth Amendment because it discriminates in voter qualifications for Congressional elections as compared to those for the State Legislature?

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Jurisdictional Statement

OPINIONS BELOW

The opinion of the Court of Appeals, App., 1-141,* is reported at 770 F.2d 265 (1985). The original opinion of the District Court is at App., 142-213. An edited version of that opinion is reported at 599 F.Supp. 1228 (1984).

JURISDICTION

This is an appeal from a decision of the Court of Appeals for the Second

* Hereafter, App. is utilized to refer to the separately bound appendices filed with this Jurisdictional Statement.

Circuit holding invalid under the U.S. Constitution § 9-431, Conn. Gen. Stats., relied on by the appellant, which provides that one must belong to a political party to vote in that party's primary elections.

Federal jurisdiction is based on 28 U.S.C. §§ 1331, 1343(a)(3) and 1343(a)(4). Judgment was entered August 8, 1985. App., 214-16. A notice of appeal to this Court was filed in the Court of Appeals for the Second Circuit on September 20, 1985. App., 217-21.

Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(2).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves Art. I, §§ 2 and 4, the First, Tenth and Seventeenth Amendments to the Constitution, § 9-431, Conn. Gen. Stats., and other provisions of Ch. 153, Parts I, II and III A., Conn. Gen. Stats., set forth in App., 222-238.

STATEMENT OF THE CASE

Conn. Gen. Stats. § 9-431 requires that persons be members of a political party to vote in that party's primary election. The plaintiffs, however, rely on a party rule which would, contrary to statute, allow unaffiliated voters to

vote in Republican primaries for United State Senators, members of the United States House of Representatives, Governor and certain state executive officers. It would not apply to other offices such as positions in the State legislature.

The rule is that of a state, rather than a national, party convention. Cf. Democratic Party of the United States v. Wisconsin, 450 U.S. 107 (1981) (involving a national party convention). It deals with state and local primaries and not presidential ones. App., 251-2.

In 1955, the Connecticut General Assembly enacted a challenge primary law.

§ 9-400 Conn. Gen. Stats. That law allows a candidate who obtains 20% or more of the convention vote to wage a primary for the nomination against the convention winner.

As part of that comprehensive primary election system, party enrollment is required in order to vote in a party's primary. The statute was passed after extensive debate, with the Assembly aware of the various primary alternatives. See 6 Conn. Sen. Proc., Pt. 11 (1955 Nov. Sp. Sess.), p. 542.

The Connecticut primary election system provides for automatic and

preferential ballot access for major parties. §§ 9-379, 9-249a, Conn. Gen. Stats. The primary is financed by public funds. See, e.g., §§ 9-436, 9-441, Conn. Gen. Stats. Party enrollment, furthermore, requires only that one fill out a short form up to one day before the primary. Conn. Gen. Stats. § 9-56; Conn. P.A. 84-118.

In 1976, the same law invalidated in this case was upheld in Nader v. Schaffer, 417 F.Supp. 837 (D.Conn. 1976, three- judge court), aff'd mem., 429 U.S. 989 (1976).

Raising The Federal Questions

The questions sought to be reviewed were raised by appellant in the District Court by Motions to Dismiss, filed June 15, 1984, and July 24, 1984, as well as by an Objection to Summary Judgment, filed July 24, 1984. The motions were denied on July 6, 1984, and December 5, 1984. Summary judgment for plaintiffs was granted on December 5, 1984. The questions were also raised by appellant in the Court of Appeals in the issues and argument portions of her brief. The questions concerning the State's regulatory responsibility and discretion

for elections and voter qualifications under Art. I, §§ 2 and 4, and the Tenth and Seventeenth Amendments were not directly addressed by the Court of Appeals.

THE QUESTIONS ARE SUBSTANTIAL

The decision of the Court of Appeals makes state laws regarding election administration subject to the acquiescence or veto of a political party, notwithstanding legitimate state interests to the contrary. Under the holding and logic of the Court of Appeals, many of the election laws of all of the states could be invalidated any

time a political party adopts an inconsistent rule.

The Court of Appeals itself acknowledged that this case has "far-reaching implications... for primary elections in particular and the two-party system in general...." App., 33-4 n.10. The District Court did the same. App., 198 n.1.

The opinion of the Second Circuit conflicts with this Court's affirmance in Nader, supra, which upheld the very law struck down below. The decision also improperly extends this Court's opinion in Democratic Party of the United States

v. Wisconsin, supra. Democratic Party involved an attempt by a state to regulate the convention of a national party; it did not involve -- nor did it ever question -- the authority of a state to regulate participation in its own state-financed primary elections.[1/]

Moreover, the Court of Appeals grossly misapplies Roberts v. United

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1/ See dissent from the dismissal of appeals in Bellotti v. Connolly, et al., ____U.S.____, 103 S.Ct. 1510 (1983), (Stevens,J., joined by Rehnquist, J., and O'Connor, J.), contrasting state regulation of a nation-wide contest with state regulation of elections for state-wide office.

States Jaycees, ____U.S.____, 104 S.Ct. 3244 (1984), to reach its remarkable conclusion that a major political party resembles an intimate human relationship. The unprecedented conception of First Amendment political associational rights announced by the Second Circuit must be set aside by this Court "if some sort of order, rather than chaos, is to accompany the democratic processes." Storer v. Brown, 415 U.S. 724, 730 (1974).

In addition, the opinion of the Court of Appeals retreats significantly from United States v. Classic, 313 U.S. 299 (1941), by substantially narrowing

the voting rights protections afforded by Art. I, §§ 2 and 4, of the Constitution.

The issue in this case is not whether open or closed primaries better promote the goals of effective, responsible and democratic government in a state; that decision was made, as it must be, by Connecticut's popularly elected state officials. The issue, instead, is what role the States have under the Constitution to regulate primary elections, and what the correct standard of review is for First Amendment challenges to state elections laws.

Because of the far-reaching implications of the decision, the misreading of several critical opinions of this Court, and pending elections schedules throughout the nation, it is essential that the questions raised by this case be resolved now.

I. A State Law Regulating State Primaries Does Not Violate Associational Rights Simply Because A Political Party Adopts A Conflicting Rule.

A. The Court Erred In Treating A Major Political Party Like An Intimate Human Relationship.

The Court of Appeals gave party rules a practical veto over state election laws by comparing political activity to "'certain intimate human

relationships.'" App.,72. The court stated that these relationships, such as marriage, raising and educating children and cohabitation with relatives, under Roberts v. United States Jaycees, 104 S.Ct. 3244 (1984), had to be protected from "'undue intrusion by the State....'" App.,72. The court included as part of "that select group of intimate relationships and bonds" support of a candidate for election. App., 73-4. This fundamental misapplication of Roberts places virtually all electoral laws and regulations in jeopardy of constitutional challenges that never before would have been recognized.

In Roberts, supra, the Supreme Court held that the Jaycees were neither small nor selective and lacked the distinctive characteristics that would entitle them to special constitutional protection. 104 S.Ct. at 3251. It was only with truly intimate groups that freedom of association was an "intrinsic element of personal liberty." Id. at 3250-3251. The two Jaycees chapters in Roberts had together fewer than 900 members. The Court of Appeals found that there were 477,749 Republicans in Connecticut. App., 21 n.4. There is absolutely nothing in the record showing that the Connecticut Republicans, a major

political party, controlling both houses of the Connecticut legislature and one half of the State's Congressional delegation,[2/] are small and selective. Nor could this be so when any elector may enroll in that party by filling out a simple form that requires no affirmation of loyalty. Conn. Gen. Stat., §§ 9-55, 9-56, 9-57. In fact, major political parties are recognized as powerful groups which "seem imbued with a quasi-governmental character." L. Tribe, American Constitutional Law 787 (1978).

2/ Conn. State Register and Manual 1985, pp. 119-133, 179, 181.

The three-judge court which upheld the identical statute struck down by the Court of Appeals stated that major party nominations were regulated in detail because "the State is particularly concerned with the parties which have demonstrated some probability of success in the gen al election and whose candidates ay become holders of public office." Nader v. Schaffer, supra, at 843. The nominations of these parties are "so important to the ultimate selection of governmental leaders." Id.

Unless the ruling of the Court of Appeals that a major political party

resembles an intimate human relationship is reversed, many important state election laws will be subject to automatic challenge with the passing fancies of political party conventions.

B. The Court Misapplied Principles Concerning A National Convention To A State Party Primary.

The Court below incorrectly relied on Democratic Party of the United States v. Wisconsin, 450 U.S. 107 (1981). App., 92-7. That decision dealt with a national, not a state, party. Its application in this case threatens a vast number of election laws in all the States.

The vital distinction between state laws regulating a state party as opposed to a national one was recognized in the dissent by Justice Stevens, joined by Justices Rehnquist and O'Connor, from the dismissal of the appeals in Bellotti v. Connolly, et al., supra, 103 S.Ct. 1510 (1980). That dissent states that, "unlike Wisconsin's attempt to control delegates in a nationwide party contest, the Massachusetts rule applies to campaigns for statewide office." Id. at 1513.

In Democratic Party, this Court explicitly stated the issue to be

"whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party." Id. at 121 (emphasis added). The Court found that "[i]t is for the National Party--and not the Wisconsin Legislature or any court--to determine the appropriate standards for participation in the Party's candidate selection process." Id. at 124 n. 27 (emphasis added).

Moreover, the Court in Democratic Party stated that Cousins v. Wigoda, 419 U.S. 477 (1975), which it found controlling, was decided "'in the context

of the selection of delegates to the National Convention.'"450 U.S.at 121.[3/]

The improper application of Democratic Party by the Court of Appeals will have a profound effect on state election laws unless the judgment below is reversed.

3/ In Cousins the Court stated that selection of delegates to national conventions could not be left to the law of each state: "Such a regime could seriously undercut or indeed destroy the effectiveness of the National Party Convention as a concerted enterprise engaged in the vital process of choosing Presidential and Vice-Presidential candidates--a process which usually involves coalitions cutting across state lines." Id. at 490. "[T]he pervasive national interest" had to prevail. Id.

C. The Court Improperly Used A Severe Standard Of Review That Preordains The Unconstitutionality Of Many State Election Laws.

Because of its unprecedented perception of the First Amendment issues implicated in this case, the Court of Appeals subjected the statute to "strict judicial scrutiny." App., 112. This made it almost impossible to defend the law's constitutionality. If strict scrutiny is appropriate in the context of the de minimis associational rights actually affected in this case, myriad election laws of all the states are now subject to a new form of challenge.

The opinion below contravened principles of review repeatedly emphasized by this Court for election cases. See, e.g., Anderson v. Celebreeze, ____U.S.____, 103 S.Ct. 1564, 1570 (1983); Rodriquez v. Popular Democratic Party, 457 U.S. 1, 8, 13-14 (1982) (a unanimous opinion by the Chief Justice employing a "not unreasonable" standard in upholding an election statute against a substantial constitutional challenge); Storer v. Brown, 415 U.S. 724, 729 (1974); Bullock v. Carter, 405 U.S. 134, 143 (1972). As the three-judge court said in upholding this very statute,

> 'Not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review.' [citations omitted]... It has never been suggested that [the rule of these decisions] automatically invalidates every substantial restriction on the right to vote or to associate.' (Emphasis supplied.)

Nader v. Schaffer, supra, at 848-9.

The constitutionality of election laws should never be be judged so rigidly and mechanically. Instead, "the character and magnitude" of the alleged constitutional injury must be considered. Anderson v. Celebreeze, supra, 103 S.Ct. 1564, 1570 (1983). Then the precise interests of the State must be identified and evaluated. This includes "the

legitimacy and strength" of each state interest. A decision is to be reached "[o]nly after weighing all these factors." Id. As this Court stated, "the state's important regulatory interests are generally sufficient to justify reasonable, non-discriminatory restrictions." Id. at 1569-70. The Anderson decision was neither followed nor acknowledged by the Court of Appeals. Instead, it elected to apply its own, and unprecedented test, and one which few state election statutes could survive when challenged by a political party.

Although the court below discussed the interests of the party and state, it placed an insuperable burden on Connecticut when it subjected the statute to strict scrutiny and held that it could only be justified by a compelling state interest. App., 112. This approach conflicts with that taken repeatedly by this Court and by other circuits. See, e.g., Anderson v. Celebreeze, supra; Storer v. Brown, supra; Baer v. Meyer, 728 F.2d 471 (10th Cir. 1984); Dart v. Brown, 717 F.2d 1491 (5th Cir. 1983). 4/

4/ In Dart v. Brown, the Fifth Circuit, in referring to American Party of

(footnote cont'd)

The proper test should be whether the state law "'unfairly or unnecessarily burdens "the availability of political opportunity."'" Anderson, supra at 1572.

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> Texas v. White, 415 U.S. 767 (1974) and Storer v. Brown, supra, stated: "[W]e believe Professor Tribe fairly characterizes these two opinions as a whole in stating that: '... each actually assayed the requirements by a far less demanding standard. In particular, the Court in several instances did not require whether a less restrictive alternative would adequately protect the state's interests.... The standard of review actually applied, therefore, seems to have been a mix of strict and minimal scrutiny.' L.Tribe, American Constitutional Law (1978), 783." 717 F.2d 1491, 1503.

1. The Interests Of The State Are Substantial And Were Substantially Ignored.

The interests of the State in this case are perhaps best stated by the three-judge district court that upheld the same statute:

> In addition to protecting the associational rights of party members, a state has a more general, but equally legitimate, interest in protecting the overall integrity of the historic electoral process. This includes preserving parties as viable and identifiable interest groups; insuring that the results of primary elections, in a broad sense, accurately reflect the voting of party members. Parties should be able to avoid primary election outcomes which will confuse or mislead the general electorate to the extent it relies on party labels as representative of certain ideologies; and preventing

> fraudulent and deceptive conduct which mars the nominating process. See generally Note, 27 Rutgers L.Rev. 298 (1974), and Comment, 40 U.Chi.L.Rev. 636 (1973). The Supreme Court has recognized the legitimacy of this state interest in decisions such as Rosario v. Rockfeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973); Storer v. Brown, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); and American Party of Texas v. White, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974).

417 F.Supp. at 845 (emphasis added). 5/ As previously noted, this Court affirmed that decision.

5/ Appellee Weicker also participated in that case, then as amicus curiae. Id. at 849-50.

Similarly, a different three-judge district court upheld the requirement of 20% of the convention vote for a primary because "[t]he State does have an interest in maintaining the integrity and stability of existing political parties, thus encouraging responsible action on their part." Tansley v. Grasso, 315 F.Supp. 513, 517 (D.Conn. 1970, Clarie, J., three-judge court) (emphasis added).

When the usefulness of the party system is seriously impaired, "[i]n the end, the chief loser would be the public." Rosario v. Rockfeller, 458 F.2d 649, 652 (2d Cir. 1972), aff'd, 410 U.S.

752 (1973). The Connecticut legislature had abundant evidence to support its concern that "open primaries" reduce the meaning of the party label. Insofar as this "weakens the party ties of elected officials, the result hardly enhances the functioning of democracy." D.Price, Bringing Back the Parties 132 (1984).[6/]

6/ See also Developments in the Law-Elections, 88 Harv. L. Rev. 1111, 1168-9 (1975) (identifying four state interests which justify party affiliation requirements for primaries); American Political Science Association, Toward a More Responsible Two Party System 71 (1950) ("The closed primary deserves preference because it is more readily compatible with the development of a responsible party

(footnote cont'd)

The Court of Appeals substantially ignores certain essential facts. The elections at issue were created not by the parties, but by the State. They are financed by the public. See, e.g., §§ 9-436, 9-436a, 9-441, Conn. Gen. Stats. The State grants the nominees of major political parties automatic ballot

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system".); V.O. Key, Politics, Parties and Pressure Groups 392 (15th ed. 1964); J.M. Burns, The Power to Lead 222 (1984); D.Lockard, Politics of State and Local Government 194 (1963); J. White, The Fractured Electorate 104 (1983); M. Jewell, Parties and Primaries, Nominating State Governors 292 (1984).

access. It also grants them preferential ballot access over the candidates of minor and petitioning parties. §§ 9-249a, 9-379, Conn. Gen. Stats. All these privileges, granted at taxpayer expense, are keyed to the party label.

In return, the public--speaking through its elected representatives-- has a right to ensure that the nomination carrying the major party label is in fact the nomination of members of that party. As stated in Rodriquez v. Popular Democratic Party, 457 U.S. 1 (1982): "The methods by which the people of Puerto Rico and their representatives

have chosen to structure the Commonwealth's electoral system are entitled to substantial deference.... Absent some clear constitutional limitation, Puerto Rico is free to structure its political system to meet its 'special concerns and political circumstances....'" Id. at 8, 13-14.

2. The Interests Of The Party Were Grossly Inflated By The Court of Appeals.

Despite its extraordinary rhetoric, the Court of Appeals never subjected the interests asserted by the appellees to serious analysis. If the Court of Appeals' cursory form of review is not

set aside by this Court, parties will have a veritable veto over considerable portions of the states' electoral codes.

An examination of the party's putative associational interests demonstrates that those interests are de minimis. The party is free to adopt whatever philosophy it wants and to send any message to the voters that it chooses. Nothing prevents it from polling unaffiliates and considering their desires. Nothing prevents it from enrolling unaffiliates as members if the unaffiliates agree.

In addition, nothing prevents a party from soliciting financial or volunteer support from unaffiliates in a primary, or votes at a general election. Absolutely nothing prevents a major party from nominating candidates with bipartisan and independent appeal, if the party so desires.

In fact, one may enroll with a party up to twelve noon the last business day before a primary to vote in that primary. Conn. Public Acts 84-118. This is an absolutely minimal limitation compared to the eight and eleven month enrollment cut off dates that were upheld by this Court

as legitimate in Rosario v. Rockefeller, supra. It simply defies reason that there could be a greater associational injury when a political party is prevented from having people vote in its primaries who voluntarily elect not to affiliate with that party than when a person is prevented from voting in an election because of his failure to meet such deadlines. And the present law does not even begin to compare with the statutes in Williams v. Rhodes, 393 U.S. 23 (1968), cited by the Court of Appeals (App., 79-82), which made it virtually impossible for a new party to be placed on the ballot.

In fact, the Court of Appeals acknowledged that the alleged intrusion into the associational rights of the plaintiff party was "not readily apparent", and that "[i]n and of itself, legislative definition of an association's boundaries may not appear to run afoul of the first amendment." App., 99, 101-2. The Court of Appeals made the inapparent apparent because it believed that "the inexorable effect" of the statute under review would be to alter the party's message. App., 102. The court of appeals in Roberts v. Jaycees, supra, had made an analogous assumption that "'some change in the

Jaycees' philosophical cast can reasonably be expected'" if women were admitted. 104 S.Ct. at 3255. This Court, in reversing, condemned this supposition as unsupported by the record. Id. at 3255.

Similarly, there is nothing in the record in this case to substantiate the assumptions of the Court of Appeals. The court stated that the party subcommittee which proposed the plaintiffs' rule had reached certain conclusions. App., 22. A proposed stipulation to this effect, however, was withdrawn in the District Court by mutual consent. App. 249-50,

281-2. The trial court made no such finding. The Court of Appeals simply misread the record. In addition, assertions by the Court of Appeals as to legislative motivation (App., 108-9) are also completely unsupported by the record. Here again, the trial court made no such findings. The same is true of the statement in the court's opinion that the statute had been "enacted by a Democratic controlled state legislature." App. 101. Not only is this devoid of any evidentiary support, it is also incorrect. In the 1955 legislature that passed this law, the Republicans had a two to one majority in the House of

Representatives. Conn. State Register and Manual 1985, p. 180.

D. The Opinion Below Has Far-Reaching Implications Impairing Orderly State Election Administration.

State regulation of elections is needed "'if some sort of order, rather than chaos, is to accompany the democratic processes.'" Anderson v. Celebreeze, supra, 103 S.Ct. at 1569 (quoting Storer v. Brown, supra, at 730). The validity of state election laws cannot depend on the passing fancies of political conventions. A law cannot be valid today because the party acquiesces but become void tomorrow because the party changes its rules.

If a single party may veto the state primary law in this case, than many other election statutes may fall by the same logic.[7/]

7/ These include in Connecticut, the right to a primary by a candidate who receives at least 20% of the convention vote, § 9-400, C.G.S.; the right to a primary to begin with, id.; the right to primary for municipal and certain party offices by obtaining sufficient petition signatures, §§ 9-406, 9-407, C.G.S.; the right to absentee ballots for a primary, ch. 144a, C.G.S.; party enrollment rights provided by law in the face of any conflicting party rules concerning loyalty oaths, test for affiliation, and durational residency requirements, see §§ 9-23a, 9-56, 9-57, C.G.S.

The court's dictum (App. 129-30)

(footnote cont'd)

In addition, even were it not for the implications for other election statutes, the party rule in this case will by itself generate enormous confusion and disorder for election administrators. Different voting qualifications, that would apply unevenly and irregularly to various parties and to

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that the State could simply limit the ability of a party to change its rules does not even begin to address these concerns and is inconsistent with the court's premise of party insulation from state laws. It could also spawn further litigation based on strict scrutiny, and create uncertainty and confusion.

various offices, would have to be enforced.

Moreover, this enforcement would have to be done amidst the pressures and uncertainties that already exist at polling places on primary day. Finally, the administrative burdens would fall largely on part-time moderators, assistant registrars, checkers, machine tenders and absentee ballot counters, most of whom serve at no more than one or two elections a year.

II. The Opinion Below Ignores The Constitutional Role Of The States In Setting Voter Qualifications And Regulating Elections Under Art. I, §§ 2 And 4, And The Tenth And Seventeenth Amendments.

The Court of Appeals stripped several important provisions of the Constitution of contemporary meaning. It essentially ignored those portions of Article I, §§ 2 and 4, and the Tenth and Seventeenth Amendments that empower States to set voter qualifications and regulate elections. In Storer v. Brown, supra, this Court asserted after referring to sections 2 and 4 of Article I, "[i]t is very unlikely that all or even a large portion of the state

election laws would fail to pass muster under our cases...." 415 U.S. at 730. If the decision of the Court of Appeals is not reversed, that will no longer be true.

Under the Constitutional distribution of powers, the States determine voter qualifications for state officers as well as for members of Congress. Storer v. Brown, supra, at 729-730; Katzenback v. Morgan, 384 U.S. 641, 647 (1966) (citing Art. I, § 2 and the Seventeenth Amendment). Moreover, as Justice Black wrote in Oregon v. Mitchell, 400 U.S. 112, 125 (1970):

"[A]rt. I, § 2, is a clear indication that the Framers intended the States to determine the qualifications of their own voters for state offices, because those qualifications were adopted for federal offices unless Congress directs otherwise under Art. I, § 4."

The ruling below to the extent that it glosses over Art. I, §4, thus erodes not only the regulatory authority of the States but of Congress as well.

Just last Term, this Court stressed "the States' 'residuary and inviolable sovereignty,'" recognizing that:

> The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in presidential elections. U.S. Const., Art. I, § 2, and Art. II, § 1.

Garcia v. San Antonio Metropolitan Transit Authority, et al., ____U.S. ____, 105 S.Ct. 1005, 1017, 1018 (1985).

Up to now, it has been accepted that "[e]ach state legislature chooses the primary election scheme that it thinks will best prcmote democratic, electoral and governmental goals." Nader v.

Schaffer, supra, 417 F.Supp. at 843. Unless the judgment below is reversed, this legislative discretion protected by the Constitution will be eliminated.

III. The Party Rule Violates Art. I, § 2, And The Seventeenth Amendment Because It Sets Different Voter Qualifications For Congress Than It Does For State Legislature.

The Court of Appeals found it "unnecessary" to decide the meaning of Art. I, § 2, and the Seventeenth Amendment because it held that the voter qualifications clauses did not apply in primaries. App., 41 n. 11. The court thus severed important constitutional protections of voting rights from an

integral part of the election process. This ruling must be reversed if the mandate of this Court in such cases as United States v. Classic, 313 U.S. 299 (1941), is to retain any meaning.[8/]

A party rule must itself be "constitutionally permissible." Democratic Party of the U.S. v. Wisconsin, supra, at 123 n. 25. See also Cousins v. Wigoda, supra, at 491. Art. I, § 2, cl. 1, of the Constitution provides

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8/ The Court of Appeals asserted that this clause "has not been subject to intense judicial scrutiny" and viewed the question "as one of first impression." App., 44, 55.

that "...the Electors [for U.S. House of Representatives] in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The Seventeenth Amendment includes virtually identical language with respect to electors for the U.S. Senate.

In Oregon v. Mitchell, 400 U.S. 112 (1970),[9/] Justice Stewart, in an opinion

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9/ In that case the 18-year-old minimum age requirement of the voting rights amendments of 1970 was upheld for Presidential and Congressional elections but invalidated for state and local elections. In addition, provisions barring literacy tests in all elections and residency requirements in Presidential elections were sustained.

concurring and dissenting in part, in which the Chief Justice and Justice Blackmun joined, concluded that:

> The Constitution thus adopts as the federal standard the standard which each State has chosen for itself.... Accordingly, a state law that purported to establish distinct qualifications for congressional elections would be invalid as repugnant to Art. I, § 2, and the Seventeenth Amendment....
>
> ...[N]o State may establish distinct qualifications for congressional elections .... [T]he States are not free to prescribe qualifications for voters in federal elections which differ from those prescribed for the most numerous branch of the state legislature.

Id. at 288-289 (emphasis added) (citations omitted). 10/

10/ Justice Stewart suggested that with respect to state residency

(footnote cont'd)

Under plaintiffs' rule, unaffiliated voters not qualified to vote for State legislative offices in Republican primaries would nevertheless vote for Congress in those primaries. Party membership has been specifically recognized as one of the qualifications for voting under the same law involved here. See Nader v. Schaffer, supra, 417

(footnote cont'd from previous page)

> requirements for voting for federal office, Congress might prescribe different qualifications because of powers existing elsewhere in the Constitution. There was no question, however, but that a state was not free to do so. There was no dispute on this point in any of the other opinions in that case.

F.Supp. at 842 n. 4, quoting Smith v. Allwright, 321 U.S. 649, 664 (1944).

That a state primary for Congress is an election under Art. I is today hardly open to question. In United States v. Classic, 313 U.S. 299 (1941), this Court held that Art. I, SS 2 and 4, applied in a primary "where the primary is by law made an integral part of the election machinery...." Id. at 318. That is the case in Connecticut under Parts I, II and III A of Ch. 153, Conn. Gen. Stats.

The Court of Appeals claimed that the qualifications clause was not even discussed in Classic. App., 53-4. Yet

the Classic Court relied upon all of Art. I, § 2, cl. 1, including the qualifications section. After quoting the state regulatory authority for Congressional elections in § 4 of Art. I, the Court then stated that the right to vote was secured by the Constitution "to qualified voters" for the House of Representatives, and was "thus to be exercised in conformity to the requirements of state law subject to the restrictions prescribed by § 2," as well as § 4. Id. at 310. See also id. at 314, 315. In fact, the decision upheld the rights of voters qualified under state law to have their votes properly counted in a primary. Id. at 308.

The application of the Constitution to primaries was reaffirmed in Smith v. Allwright, 321 U.S. 649 (1944), which held that the duties imposed by state statutes on a party for the selection of its nominees "do not become matters of private law because they are performed by a political party." Id. at 663. This Court concluded:

> The privilege of membersnip in a party may be, as this Court said in Grovey v. Townsend, 295 U.S. 45, 55, no concern of a State. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State. Id. at 664-5.

See also Buckley v. Valeo, 424 U.S. 1, 13-14 n. 16 (1976) (upholding Congress's authority to regulate primaries under Art. I, § 4.)

CONCLUSION

It is therefore respectfully submitted that the questions in this case require full consideration by this Court and that probable jurisdiction should be noted.

Respectfully Submitted

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vember 1985